IN THE

Supreme Court of the United States

OCTOBER TERM, 1947.

No. 847 78

JOSEPH M. TAUSSIG, *Petitioner,*

vs.

HONORABLE JOHN P. BARNES, UNITED STATES DISTRICT JUDGE FOR THE NORTHERN DISTRICT OF ILLINOIS.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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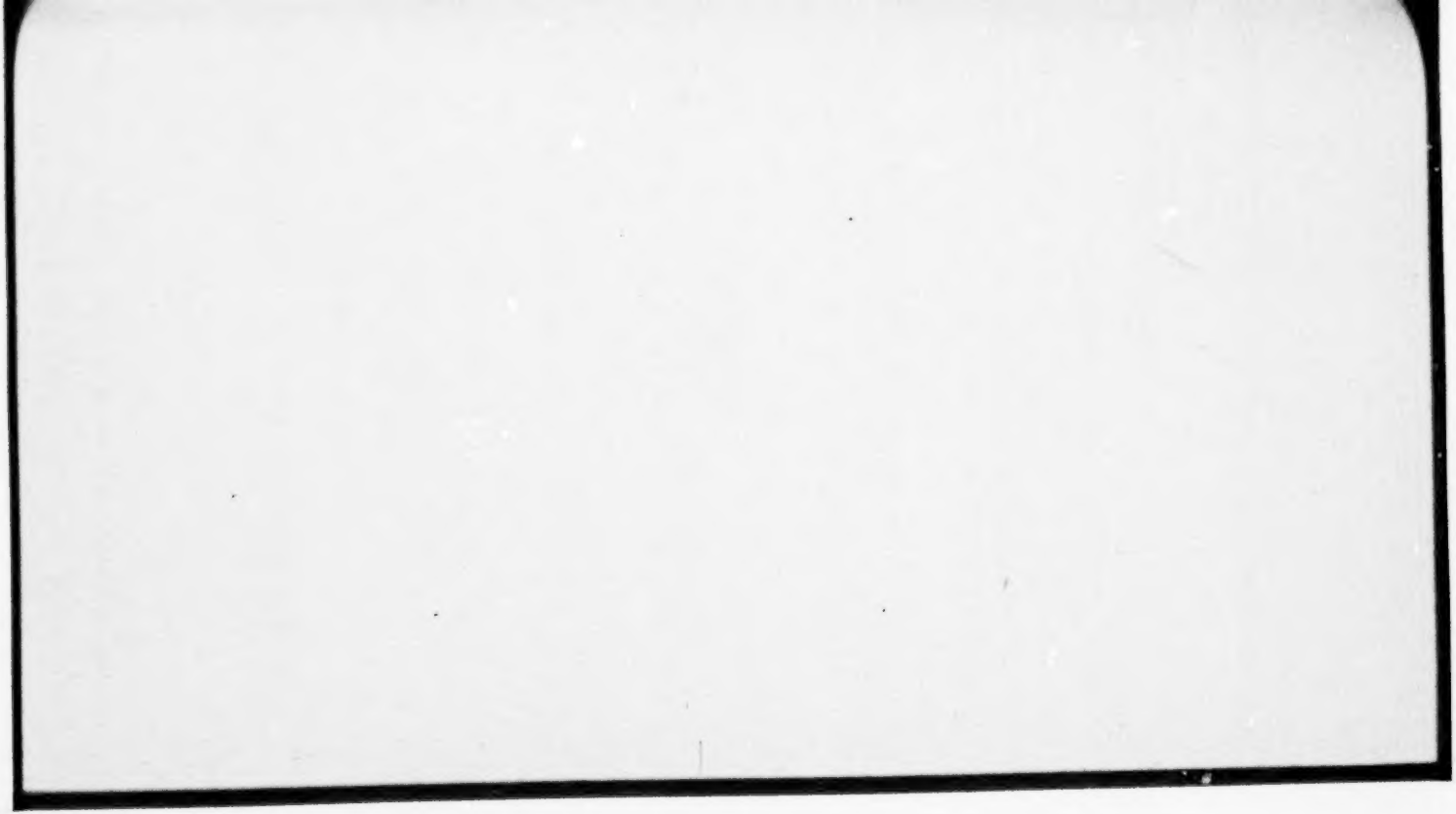

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Joseph M. Taussig, Petitioner, by his Attorneys, prays that a Writ of Certiorari issue to review the orders and judgment of the Seventh Circuit Court of Appeals which denied (Rec. 326) the Petition (Rec. 5-29, 327) of Petitioner for a Writ of *Mandamus* directing the District Court of the Northern District of Illinois, Eastern Division, to vacate and expunge all orders and decrees entered in a proceeding in which said District Court was wholly without jurisdiction, and to dismiss said proceeding.

Opinion Below.

The *Per Curiam* opinion of the Seventh Circuit Court of Appeals denying the Petition for a Writ of *Mandamus* has not yet been reported, but is set forth in the Transcript of Record, Pages 333-337.

Jurisdiction.

The orders and judgment of the Circuit Court of Appeals were entered on March 9th, 1948 and March 18th, 1948 (Rec. 326, 338). Jurisdiction is invoked under Section 240 of the Judicial Code of the United States as amended, Title 28 U. S. C. A. Section 347.

Questions Presented.

The questions presented are:

1. Where the jurisdiction of a District Court rests upon a diversity of citizenship of parties, does the lack of such diversity of citizenship at the time of commencement of the suit, constitute a fundamental lack of jurisdiction?

2. Was the District Court bound to perform its judicial duty by declining ungranted jurisdiction?

3. Is the Writ of *Mandamus* available from the Circuit Court of Appeals to require the District Court to vacate and expunge orders entered in a proceeding in which the District Court was, upon proper realignment of the parties, wholly without jurisdiction, by reason of a lack of diversity of citizenship of the parties?

4. Are the decrees and orders of the District Court, entered in a proceeding in which it was without jurisdiction by reason of a lack of diversity of citizenship, wholly void and subject to review and expunging by the Circuit Court of Appeals upon petition for Writ of *Mandamus*?

5. Is the Writ of *Mandamus* available from the Circuit Court of Appeals, to review and expunge void decrees and orders of a District Court, when the time for statutory appeal has expired, or when such an appeal would have been premature?

Statutes Involved.

Judicial Code, Sec. 37, as amended, 28 U. S. C. A. Sec. 80.

Judicial Code, Sec. 262, as amended, 28 U. S. C. A. Sec. 377.

Summary Statement of the Matter Involved.

Petitioner is one of several defendants named in a complaint filed in the United States District Court of the Northern District of Illinois, Eastern Division, by his sister Mrs. Ruth Saxelby. Jurisdiction depends upon diversity of citizenship and Petitioner demonstrated to the District Court and the Seventh Circuit Court of Appeals that it is apparent on the face of the record (see tabulation infra) that this essential diversity of citizenship is wholly lacking; that realignment of indispensable parties in accordance with their true interests places citizens of Illinois and Minnesota on both sides of the case.

The District Court overruled repeated objections (Rec. 79, 82, 97, 147, 186, 190) to its jurisdiction, refused to realign the parties, heard proofs, entered a preliminary decree (Rec. 202) on June 4, 1947, referred the matter to a master-in-chancery (where it is still pending) and retained its "jurisdiction" to enter further and presumably final decrees.

On March 9, 1948, Petitioner was permitted by the Seventh Circuit Court of Appeals to file his petition for an

order on the District Court to show cause why *mandamus* should not issue. On the same day that petition was summarily denied without hearing. On March 18, 1948, motions of petitioner to amend his petition and to supplement the appendix to his petition, were denied and a *Per Curiam* opinion was filed (Rec. 333) in support of the denial of a writ of *mandamus*.

Petitioner is sued as an individual and as a co-trustee under the will of the father of both the plaintiff and petitioner. The bill charges the petitioner and his co-trustee with mismanagement and failure to account for trust assets, and charges petitioner with conversion of certain trust assets. It prays that petitioner and his co-trustee be removed and a qualified trustee be appointed to act in their stead; that title to certain parcels of real estate including one held by petitioner and his co-trustee, and another held by the American National Bank and Trust Company of Chicago, as trustee, be transferred to the new trustee for the benefit of the trusts; that the petitioner and his co-trustee give an accounting; that all other beneficiaries (except petitioner) of the trusts in question have the recovery and relief sought by the plaintiff; that the plaintiff recover her costs in the proceedings and attorney fees incurred in the restoration of assets to the trusts.

Plaintiff Saxelby is a citizen of New York. Petitioner is a citizen of Illinois. The complaint (Rec. 42-61) also names as defendants, Irving Robitshek, individually and as co-trustee, a citizen of Minnesota, Ella Robitshek of Minnesota, Rose Goodman of Wisconsin, American National Bank and Trust Company of Chicago, as trustee, and Leo Taussig who is alleged (Rec. 43) to be a citizen of Wisconsin, but who was later found by the Court (Rec. 200) to be a citizen and legal resident of Illinois at the time the complaint was filed.

The complaint further states that it is brought on behalf of all beneficiaries (except petitioner) of trusts set up by the will of plaintiff's father. Additional parties were later found to be indispensable or necessary and were added as parties defendant and plaintiff's children were added as parties plaintiff.

Leo Taussig, one of these so-called defendants, requires special notice: plaintiff alleges (Rec. 58) that the said Leo Taussig has a lien upon the trust properties to the extent of $5,000.00 annually and a specific right and claim therefor against the petitioner and his co-trustee; that the said Leo Taussig is an incompetent, requires a guardian ad litem, and is a citizen and resident of Wisconsin. The answer filed for Leo Taussig (Rec. 331) alleges lack of knowledge as to the citizenship of himself, and other parties and prays relief from the petitioner and his co-trustee in substantially the same manner and degree as prayed by the plaintiff Saxelby. The Court first found that Leo Taussig was a resident of Wisconsin (Rec. 168) at the time of filing of the complaint, but later found (Rec. 200) that he was a legal resident and citizen of Illinois at the time of filing of the complaint, but was temporarily residing in Wisconsin and that he died some months after the filing of the complaint.

A proper realignment of the indispensable and necessary parties, at the time of filing of the complaint, in accordance with their real interest as shown by the complaint (Rec. 42-61) and answers (Rec. 92-110, 147-152, 186-190, 196-8) and the Findings of Fact (Rec. 168-183, 199-201) and Conclusions of Law (Rec. 167-8, 201-2) and the Preliminary Decree (Rec. 204-9) shows the following:

Plaintiffs	Residence	Defendants	Residence
Ruth Saxelby	New York (R. 168)		
J. Robert Saxelby	New York (R. 200)		
Lois Saxelby	New York (R. 200)		
Joyce Saxelby	New York (R. 200)		
Leo Taussig	Illinois (R. 200)		
Fannie Daus	Illinois (R. 192, 200)		
Leontine Robitshek	Illinois (R. 200)		
Joseph M. Taussig (as beneficiary)	Illinois (R. 168)	Joseph M. Taussig	Illinois (R. 168)
Antoinette T. Hertzberg	Massachusetts (R. 200)	American National Bank & Trust Co.	Illinois (R. 169)
Ernest Taussig	California (R. 200)		
Rose Goodman	Wisconsin (R. 169)		
Alvin Goodman	Wisconsin (R. 200)		
Alvin Goodman, Jr.	Wisconsin (R. 200)		
Julia Joy Goodman	Wisconsin (R. 200)		
Ella Robitshek	Minnesota (R. 169)		
Irving H. Robitshek, Jr.	Minnesota (R. 200)		
Irving H. Robitshek (as beneficiary)	Minnesota (R. 168)	Irving H. Robitshek	Minnesota (R. 168)

After entry of the preliminary decree on June 4, 1947, the petitioner and certain other parties to the suit were misled and induced into signing a purported waiver (Rec. 294-7) of certain rights of appeal from said preliminary decree. This action was induced by misrepresentations by counsel for the plaintiff as to his arrangements with the plaintiff for his compensation; the actual facts appear from the affidavits of four members of the Bar and a sister of plaintiff (Rec. 315-325; Exhibits XXXI, XXXII, XXXIII, XXXIV, XXXV).

When the falsity of the representations was discovered by petitioner on September 11, 1947 (Rec. 26), the time for praying an appeal to the Circuit Court of Appeals from the preliminary decree had expired but a final decree had not been entered, the parties being then engaged in hearings in an accounting before a Master-in-Chancery and the matter was still pending there at the time of filing the petition for *mandamus*.

Specification of Errors to be Argued.

The Circuit Court of Appeals erred:

1. In refusing to issue a rule upon the District Court to show cause why *mandamus* should not issue.

2. In refusing to issue the Writ of *Mandamus* to the District Court.

3. In not holding that the proceedings of the District Court were void for want of jurisdiction.

4. In holding that it had no authority to issue *mandamus* to require the District Court to perform its statutory duty.

5. In validating, in effect, a fraud perpetrated on petitioner and others, in the procuring of the purported "waiver," and thus depriving petitioner and others of property without due process of law in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States.

Reasons Relied on for the Allowance of the Writ.

I.

The Seventh Circuit Court of Appeals has Rendered a Decision in Conflict with the Decisions of the other Circuit Courts of Appeals on the Same Matter.

The Seventh Circuit Court of Appeals in this case held that *mandamus* does not lie to review and set aside orders and a preliminary decree entered in proceedings beyond the jurisdiction of the District Court. It would relegate the petitioner to a statutory method of appeal whether the time for that appeal had passed or had not yet arrived. It insists that the petitioner show the absence of any other mode of relief even though the District Court was shown on the face of the record, to be wholly without jurisdiction. It has refused to issue a rule to show cause or the writ of *mandamus* as an exercise of appellate jurisdiction and mistakenly holds that it is available only in aid of appellate jurisdiction.

The Sixth Circuit Court of Appeals reached an opposite conclusion on the same matter in 1922 in *Grable* v. *Killits, District Judge,* 282 F. 185 (Cert. den. in *Bacon Bros. Co.* v. *Grable,* 260 U. S. 735). The decision in that *mandamus* case reads in part, page 195:

> "It results from these views that petitioners are entitled to the relief asked in the mandamus proceeding, No. 3713, setting aside the orders of the court below * * *. This court had undoubted jurisdiction to issue such a *writ of mandamus* in aid of its general appellate authority. The action of the District Court being without jurisdiction to the extent stated, no question of discretion is involved. Petitioner should not be required to await the slow process of an appeal from such invalid order, whose operation meanwhile involves an encroachment upon their rights."

The Eighth Circuit Court of Appeals also held to the contrary:

> "Each Court has jurisdiction to issue the writ to a subordinate Court or judge in the exercise of and in aid of its appellate jurisdiction." (*Barber Asphalt Pav. Co.* v. *Morris,* 132 Fed. 945, 952.)

The Ninth Circuit Court of Appeals held in *In Re Dennett,* 215 Fed. 673, 679, that mandamus is the proper remedy in the Circuit Court of Appeals to review a District Court's order that was entered without jurisdiction of the cause; that this is correct procedure even though a right of review by writ of error or by appeal, also existed.

II.

The Seventh Circuit Court of Appeals has Decided Federal Questions in a Way Probably in Conflict with Applicable decisions of this Court.

A. The Court below held that the Writ of Mandamus was not available AS AN EXERCISE of Appellate Jurisdiction "When a Statutory Method of Appeal has been Prescribed or to Review an Appealable Decision of Record" (R337); that the Writ is available ONLY IN AID of Appellate Jurisdiction; that Mandamus should not issue here to restrain a District Court whose lack of jurisdiction is apparent on the fact of the record.

This decision is in conflict with this Court's views as expressed first in *Marbury* v. *Madison,* 1 Cranch 137, 175, and as lately as May 24th, 1948, in *U. S. A., Petitioner,* v. *U. S. District Court,* No. 527, October Term, 1947 (not yet reported). In the latter case this Court stated:

> "It was early recognized that the power to issue a *mandamus* extended to cases where its issuance was either an exercise of appellate jurisdiction or in aid of appellate jurisdiction. See *Marbury* v. *Madison,* 1 Cranch 137, 175; *Ex Parte Crane,* 5 Pet. 190."

Mandamus is in the nature of appellate jurisdiction and lies as a remedy of an Appellate Court to superintend all inferior tribunals "by restraining their excesses, but also by quickening their negligence and obviating their denial of justice" (3 BL. Comm. 111; *Ex Parte Crane,* 5 Pet. 190, 192).

Even though a petitioner may have alternative rights of appeal available, the writ of *mandamus* should issue to a lower court which acted without jurisdiction (*In Re Winn,* 213 U. S. 458, 465-68).

McClellan v. *Carland,* 217 U. S. 268, 279, held that the Circuit Court has the right to issue *mandamus* as an exercise of appellate jurisdiction and is not restricted to action "in aid of the appellate jurisdiction," or to wait until it gets jurisdiction of the original suit by appeal from the District Court.

Ex Parte U. S., 287 U. S. 241, 246, states that the power of the Circuit Court to issue *mandamus* is not limited to cases where the writ is required in aid of an appellate jurisdiction already obtained; that immediate and direct appellate jurisdiction is "lodged" in the Circuit Court of appeals.

This Court said *In Re Metropolitan Trust Co.,* 218 U. S., 312, 314, that "as the Court, in granting the motion, exceeded its power, mandamus is the appropriate remedy. *Ex Parte Bradley,* 7 Wall, 364; *In Re Winn,* 213 U. S. 458."

B. Since the District Court was Wholly Without Jurisdiction the Circuit Court of Appeals was without Discretion, and was Required to Issue Mandamus.

Where the District Court is without jurisdiction, the cause is *coram non judice* and every act done is a nullity (*Ex Parte Crane,* 5 Pet. 190, 192). Since the necessary

diversity of citizenship was lacking and the court was without jurisdiction, its orders were absolutely void (*Elliott* v. *Peirsol*, 1 Pet. 328, 340; *Griffith* v. *Frazier*, 12 U. S. 1, 28).

"Now, this want of jurisdiction of the inferior court * * *, is one of the specific cases in which this writ [mandamus] is the appropriate remedy." (*Ex Parte Bradley*, 7 Wall. 364-377.)

In Virginia v. *Rives*, 100 U. S. 313, 323-324, it is stated that *mandamus* is the correct remedy when the case is "outside the jurisdiction of the court or officers to which or to whom the writ is addressed. One of its peculiar and more common uses is to restrain inferior courts and to keep them within their lawful bounds."

This Court also held in *D. L. & W. R. R.* v. *Rellstab*, 276 U. S. 1, 5, that mandamus is the appropriate remedy where the District Court entered orders without jurisdiction; that the Writ should not be refused even on the ground of claimed injustice; that the lack of jurisdiction of the District Court put an end to the matter. That "The issue of a mandamus is closely enough connected with the appellate power."

The purported waiver of the rights of appeal of petitioner and other parties to the preliminary decree should not affect in any way the questions presented to the Circuit Court of Appeals or to this Court. The parties have themselves ignored the purported waiver for the nullity that it is; the proceedings before the master-in-chancery have not been completed and the rights of the parties to appeal from a final decree will be available in any case when that decree is entered. Finally it is a truism that jurisdiction cannot be conferred upon a court by the par-

ties to litigation where in fact and in law it was without jurisdiction; a void waiver cannot confer the jurisdiction or make valid a void suit.

C. Federal Courts are Limited in Jurisdiction and Where Diversity of Citizenship is Necessary, the District Court must Determine the Facts of Citizenship, align the Parties in Accordance with their True Interest, and Show the Jurisdiction of the Court on the Record.

All of the parties on one side of a suit must be citizens of different states from all of the parties on the other side, in order to sustain jurisdiction based on diversity of citizenship (U. S. Cons., Art. 3, Sec. 2; Jud. Code, Sec. 37, as amended, 28 U. S. C. A. Sec. 80; *Edwards* v. *Glasscock,* 91 Fed. 2nd, 625, 627.

Diversity of citizenship is a question of fact and depends upon the state of things at the time the suit was brought (*Mullen* v. *Torrance,* 9 Wheat 537, 538; *Tutun* v. *United States,* 270 U. S. 568, 578; *M. C. & L. M. Ry. Co.* v. *Swan,* 111 U. S. 379, 382, 383).

Objections based on the court's lack of jurisdiction of the parties may be raised at any stage of the proceedings and if the court is without jurisdiction its duty is to stop (*The John C. Sweeny,* 55 F. 540, 541). In such case the court has no jurisdiction but to set aside any improperly made orders (*Mail Co.* v. *Flanders,* 79 U. S. 130, 135).

Upon finding that diversity of citizenship did not exist (that Leo Taussig was a citizen of Illinois and that the complaint and his answer showed his interest to lie with the plaintiff and against the defendant) the District Court should have proceeded no further and was obliged to dismiss the suit (*Anderson* v. *Watt,* 138 U. S. 694, 702, 708).

It was the duty of the District Court to realign the parties and the Circuit Court of Appeals should have re-

quired this to be done (*Hamer* v. *New York Railways Co.*, 24 U. S. 244; *City of Indianapolis* v. *Chase National Bank*, 314 U. S. 63; *Thomas* v. *Gaskil*, 315 U. S. 442; *Town of Lancaster, Fla.* v. *Hopper*, 102 Fed. 2nd 118).

The re-alignment must be made in accordance with the real interest of the indispensable and necessary parties (*Shields* v. *Barrows*, 17 How. 130, 139; *DeGraffenried* v. *Yunt-Lee Oil Co.*, 30 Fed. 2nd 574; *Magnolia Petroleum Co.* v. *Suits*, 40 Fed. 2nd 161).

This Court should require the Seventh Circuit and the District Court to follow the decision in *Mansfield, Coldwater and Lake Michigan Railway Company* v. *Swan*, 111 U. S. 379, 383, as follows:

> "And in the most recent utterance of this Court upon the point in *Bors* v. *Preston, ante* [111 U. S. 252], it was said by Mr. Justice Harlan: 'In cases of which the Circuit [District] Courts may take cognizance only by reason of the citizenship of the parties, this Court, as its decisions indicate, declined to express any opinion of the merits, on appeal or writ of error, where the record does not affirmatively show jurisdiction in the court below; this, because the courts of the Union, being courts of limited jurisdiction, the presumption in every stage of the cause is, that it is without their jurisdiction, unless the contrary appears from the record.' *The reason of the rule, and the necessity of its application, are stronger and more obvious, when, as in the present case, the failure of the jurisdiction of the Circuit [District] Court arises, not merely because the record omits the averments necessary to its existence, but because it recites facts which contradict it.*" (Italics added)

The Circuit Court of Appeals should have required the District Court, by Writ of Mandamus, to perform its statutory duty in dismissing a suit over which it had no juris-

diction (*Gilbert* v. *David,* 235 U. S. 561, 567); at the very least the Circuit Court should have required a return to the rule to show cause why *mandamus* should not issue, and should have heard the matter upon review.

III.

The Seventh Circuit Court of Appeals has Decided an Important Question of Federal Law Which has Not been but should be Settled by this Court.

The Court below withheld *mandamus* despite a showing, on the face of the record, that a District Court had acted and was proceeding without jurisdiction. May the Circuit Court of Appeals refuse mandamus in its discretion on the ground that the time for statutory appeal had passed or had not arrived?

This question is of far-reaching importance to citizens. The effect of the Seventh Circuit's decision would be to pinch off a necessary remedy which has many times in the past been found essential to "Due Process of Law" for the protection of citizens, and to the exercise of the supervisory and appellate powers of intermediate courts of appeal.

Every act done by a District Court acting without jurisdiction, is a nullity. This fundamental lack of jurisdiction should be subject to attack in any court at any time (*Ex Parte Crane,* 5 Pet. 190, 192). It is the District Court, not the litigant, who is at fault in proceeding beyond its lawful bounds. Appellate courts should be available to correct the excesses of the District Courts, for no court has discretion to exceed its jurisdiction.

District Courts sometimes proceed without requisite jurisdiction. If those proceedings continue unrestrained until final decree and review by statutory appeal, great

damage may be caused to the liberty and property of litigants. In practical results a litigant who is compelled to proceed by void orders of a District Court, may be unable to meet the expenses of a statutory appeal, quite aside from bearing the burdens and injustice of an illegal and void trial or equity hearing. These instances emphasize the citizen's need for a right of direct review and for the issuance of an appropriate writ of *mandamus,* to review and determine the fundamental questions of the jurisdiction of a statutory United States District Court.

If the substantial benefits of the Writ of *Mandamus* are to be no longer available in Circuit Courts of Appeal, this Court should so declare. The right involved is fundamental.

IV.

The Seventh Circuit Court of Appeals Has So Far Departed From the Accepted and Usual Course of Judicial Proceedings, or So Far Sanctioned Such a Departure By a Lower Court, as to Call for an Exercise of this Court's Power of Supervision.

The District Court on the face of the Record, was Without Jurisdiction by Reason of a Lack of Diversity of Citizenship. The Circuit Court of Appeals has Refused to Issue a Rule on the District Court, on the Ground that Mandamus is not Available for the Exercise of Its Appellate Jurisdiction.

If the Court's supervisory power does not require the Circuit Court of Appeals to issue writs of *mandamus* in cases of this kind, the consequence will be grievous. Then litigants will be compelled to wait until the entry of final decrees or judgments to obtain a review that often is slow and invariably is expensive, in order to set aside proceedings which were wholly void from the beginning. In

some cases the mode of attack may necessarily be collateral and may even involve the risk of a possible citation for contempt of court.

The denial by the Circuit Court of Appeals of the availability of *mandamus* places improper burdens upon the whole Federal judiciary system. The Circuit Court of Appeals should be compelled to hear and grant relief by *mandamus* to those who ask that a District Court perform its clear duty to proceed no further and to dismiss an action over which it is without jurisdiction because of limited statutory power (*Kloeb, District Judge* v. *Armour,* 311 U. S. 199, 204). The need here for the Court's supervision is similar to that recognized in *McCardle* v. *Cosgrove, District Judge,* 309 U. S. 634; *Ex Parte U. S.,* 287 U. S. 241.

As stated in *Ex Parte McCardle,* 7 Wall. 506, 515, "Judicial duty is not less fitly performed by declining ungranted jurisdiction than in exercising firmly that which the Constitution and the laws confer."

Also it is often necessary to permit the use of *mandamus* in order to avoid "piecemeal" appeals.

The Circuit Court of Appeals should be eager rather than reluctant to hear and review the requests of a citizen to be protected, by *mandamus,* from void proceedings in the District Court. The Circuit Court's power should be directed toward the prompt correction of an abuse of statutory jurisdiction by a subordinate court, rather than toward a rigorous insistence upon modes of appellate procedure to be followed by litigants who have been compelled to participate in void proceedings. The paramount appellate duty is to correct the wrong rather than the method of application for relief.

The Circuit Courts should be amenable to the rule imposed by this Court upon itself that it must "deny its own jurisdiction, and, in the exercise of its appellate power, that of all other courts of the United States, in all cases where such jurisdiction does not affirmatively appear in the record on which in the exercise of that power, it is called to act." (*M. C. & L. M. Ry Co.* v. *Swan,* 111 U. S. 379, 382).

CONCLUSION.

It is respectfully submitted that this Court should grant the Writ of Certiorari to the Seventh Circuit Court of Appeals.

Respectfully submitted,

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Attorneys for Petitioner.

June 5, 1948.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1948.

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JOSEPH M. TAUSSIG,
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vs.

HONORABLE JOHN P. BARNES, UNITED STATES DISTRICT JUDGE FOR THE NORTHERN DISTRICT OF ILLINOIS.

REPLY OF PETITIONER TO BRIEF OF AMICUS CURIAE.

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REPLY OF PETITIONER TO BRIEF OF AMICUS CURIAE.

FOREWORD.

Certain errors and misstatements of fact appear in the Brief of *Amicus Curiae*:

1. Contrary to the assertions of *Amicus Curiae*, pages 2-3, Petitioner has grounded this petition upon one of four points originally urged: that the District Court was without jurisdiction, in that no diversity of citizenship exists to give that court jurisdiction upon which to proceed; the result is that all of its judicial determinations are void, save that finding the citizenship of the parties, and are expungable by mandamus, here sought.

2. *Amicus Curiae* has gone beyond the record and the facts in denying that a purported waiver by the petitioner of rights of appeal below was invalid. While *Amicus Curiae* does not deny that one of them misrepresented his fee arrangements with the Plaintiff below, it infers in its Brief, page 10, that Petitioner received an Executor's fee of $15,000 as consideration for the purported waiver and dismissal of Plaintiff's Petition To Remove The Executor (Petitioner) in the Probate Court of Cook County. Actually, the $15,000 was never paid. Yet, one of the Plaintiff's attorneys, who is here one of the *Amicus Curiae*, has filed another Petition To Remove The Executor (Petitioner) on behalf of the Successor Trustee, and also Objections to the payment of the said Executor's fee of $15,000, which is still unpaid. Said Petition To Remove and said Objections, are now pending in said Probate Court.

Petitioner was and is correct in stating, at Page 11 of his Petition for Certiorari, that "the parties have themselves ignored the purported waiver for the nullity that it is."

3. *Amicus Curiae* goes outside of the record on two other occasions: (1) on pages 11, 12 and 14, of its Brief it inserts self-serving portions of purported arguments made by it and other counsel before the District Court; and (2) in its Brief, page 20, refers to a third party proceeding, by Petitioner in the District Court, wherein a separate decree was entered which is subject to the identical fatal lack of jurisdiction as that before this Court in the Petition. What is an apparent inconsistency is of no moment here for that appeal is the only means available to Petitioner for the protection of his right of appeal in that third party proceeding and the holding of that matter in abeyance pending the determination of the jurisdiction question by this Court.

4. The remarks of *Amicus Curiae*, pages 20-1, its Brief,

anent the character of Petitioner, are unwarranted and out of place in its Brief.

Our Reply follows the sequence of the Brief of Amicus Curiae.

I.

The Seventh Circuit Court of Appeals Has Rendered a Decision in Conflict with the Decisions of Other Circuit Courts of Appeals on the Same Matter.

Petitioner will allow his citations of authorities under this Point to stand against those of *Amicus Curiae* without further comment thereon. However, *Amicus Curiae* has made the point that the District Court had "discretion" to acquire jurisdiction of the parties and matter, or not to do so, by realigning, or by not realigning, the parties in accordance with its discretion regarding their respective citizenships and real interests. Not only is this a false issue, but is something that *Amicus Curiae* must prove from the mandatory record to the satisfaction of this Court.

Notwithstanding the assertions of *Amicus Curiae*, the record itself proves that the District Court did not have jurisdiction on the only ground asserted, that of diversity of citizenship. Also, the Court's own decree on that point contradicted certain of its findings with regard thereto. (See Point II c, *infra.*) In essence, the District Court transcended the jurisdiction accorded to it under the statutes, (28 U. S. C. A. 41 and 80), as appears more fully under Point II c of our Main Brief.

II.

The Seventh Circuit Court of Appeals Has Decided Federal Questions in a Way Probably in Conflict With Applicable Decisions of This Court.

A. Petitioner relies upon the discussion of this point in his Main Brief. In its reply thereto, *Amicus Curiae* have merely specified certain functions of mandamus, all of which, together, are the means whereby a court requires officials, official bodies and inferior courts to perform their respective duties within, rather than without, their respective spheres, each sphere being determined by the law governing the functions of each. And in replying to a mandamus, each respondent has the opportunity to support its questioned action, by citing fact and law, rather than by mere assertion, as is here being attempted by *Amicus Curiae*.

B. In *Hill* v. *Walker*, 167 Fed. 241, appears a discussion, too lengthy to quote here, on the meaning of "discretion" with regard to the determination of jurisdiction on "diversity" grounds and also with regard to the determination of parties who are plaintiff and defendant. It points out that "jurisdiction" is not a vague undeterminable thing, varying with individual judges, but that it is and must be "a legal certainty", provable and determinable from the facts affecting citizenship and interest. These become part of the mandatory record, which supports, or fails to support, the judgment of the court on review.

In *Thomson* v. *Butler*, 136 Fed. 2nd. 644, (certiorari denied, 320 U. S. 761), the court said, page 647:

> "For purposes of testing the jurisdiction of federal courts on the basis of diversity of citizenship, it is immaterial how the parties may have been designated

in the pleadings, *since the court must align them for jurisdictional purposes on the basis of their actual legal interests and the apparent results to them, if the object sought to be accomplished by the litigation is successful.* (Citing cases.) * * * Since all of the parties were not citizens of different states from all of the parties on the other side, the court necessarily *was obliged* to hold that it had no jurisdiction of the suit on the basis of diversity." (Citing cases.) (Italics added.)

It is submitted that the District Court, in the case at bar, did not align the parties, in accordance with its duty and the proof before it, else it would have dismissed the complaint.

It is not gainsaid that the fundamental issue was the return of trust property to the trustee, one of whom had bought it, with the silent acquiescence of the other trustee. It is inescapable that, in arranging the parties here according to their respective interests, the trustees, are on one side as defendants, and all of the other parties are on the other side, as plaintiffs. (See Main Brief, page 6.) Yet, such was not the determination of the District Court, which, according to page 10, Brief of *Amicus Curiae,* arrived at a different result by the exercise of its "discretion". But that result does not stand the test of the requisite "legal certainty".

Quite recently, this Court has reiterated the law determining jurisdiction in diversity of citizenship cases, *Indianapolis et al.* v. *Chase National Bank,* 314 U. S. 63, 69:

"Diversity jurisdiction cannot be conferred upon federal courts by the parties' own determination of who are plaintiffs and who defendants. It is our duty, as it is that of the lower federal courts, to 'look beyond the pleadings and arrange the parties according to their sides in the dispute.' *Dawson* v. *Columbia Trust Co.,* 197 U. S. 178, 180. Litigation is the pursuit of practical ends, not a game of chess. Whether the

necessary 'collision of interests,' *Dawson* v. *Columbia Trust Co., supra,* at 181, exists, is therefore not to be determined by mechanical rules. It must be ascertained from the 'principal purpose of the suit,' *East Tennessee, V. & G. R.* v. *Grayson,* 119 U. S. 240, 244, and the 'primary and controlling matter in dispute,' *Merchants' Cotton Press Co.* v. *Insurance Co.,* 151 U. S. 368, 385. These familiar doctrines governing the alignment of parties for purposes of determining diversity of citizenship have consistently guided the lower federal courts and this Court."

And at page 76, it continues:

"The fact that Chase prefers the adjudication of its claim by the Federal court is certainly no reason why we should deny the plain facts of the controversy and yield to illusive artifices. Settled restrictions against bringing local disputes into federal courts cannot thus be circumvented. * * * The policy of the statute [conferring diversity of citizenship jurisdiction upon the district courts] calls for its strict construction."

The correct solution of the problem in the instant matter appears in an opinion involving a similar state of facts, wherein several trustees were sued in an effort to have one of them return trust property to the trust, and there the court said, *Backer* v. *Levy,* 82 Fed. 2nd. 270, 274:

"If thus aligned, the court would be ousted of jurisdiction, since the [indispensable parties] are citizens of the same State as the defendant Levy. Therefore, in any event, a suit in the District Court must fail. But, if the complainants have a good cause of action, they will lose no rights because they may apply to the Surrogate of New York County under section 259 of the New York Surrogate's Court Act for a general compulsory accounting by the trustees, or they may bring suit in the State Supreme Court if the trustees refuse, after demand, to take action. We can see no justification for resorting to the federal court in such a case as this."

It is suggested, to this Court, that litigants in Illinois have similar rights for similar purposes.

C. Leo Taussig's citizenship, as well as that of all other parties to the proceeding must be determined by the facts and proof before the District Court. This is true also of all of the other parties to the suit. On the basis of the showing made on both interest and citizenship, the parties must be aligned, in accordance with the duty imposed on all federal courts, and the "familiar doctrines governing the alignment of parties for purposes of determining diversity of citizenship." (*Indianapolis* v. *Chase National Bank*, 314 U. S. 63, 69.)

Leo Taussig was an indispensable party according to Paragraphs 11 and 14 (R. 58, 59) of the complaint filed by the plaintiff, as follows: Petitioner "has depleted the available funds for the support and maintenance of Leo Taussig, an incompetent"; "Plaintiff brings these proceedings on behalf of himself and on behalf of each and every one of the other beneficiaries * * * except [Petitioner]" (R. 59).

Yet, in the face of this record *Amicus Curiae* insists Leo Taussig's interest is opposed to that of Plaintiff below!

The will attached to the complaint (R. 58) made uncontrovertable that Leo Taussig's interest was the regaining by the trust of the removed property, along with the interests of the others who were to benefit thereunder. Opposed to his interest and theirs, was the Petitioner; his interest lay in keeping the property for himself. This is made clear by the complaint, particularly by the prayer (R. 60-1) and the answers of both Leo Taussig (R. 332) and Petitioner (R. 58-68). Leo Taussig's interest, as well as that of all other parties, save the Petitioner and Irving Robitshek, and other trustee, was to get and share that which Petitioner wanted to keep and not to share.

The Court first found that Leo Taussig was a citizen of Wisconsin, (R. 168) but later corrected this error of fact by finding him to be a citizen of Illinois, at the time the suit was filed (R. 200).

Similarly, Fannie Daus was admitted to be a citizen of Illinois and should have been a plaintiff (R. 192, 200).

Leontine Robitshek was situated similarly to Leo Taussig: claiming a share in what Petitioner wanted to keep (R. 201). She was a citizen of Illinois and properly she should have been a plaintiff (R. 170).

The deaths of Leo Taussig and Fannie Daus, during the pendency of the suit could not remedy the patent lack of jurisdiction; diversity is bottomed on facts and on the state of things at the time the suit is brought. (*Mullen* v. *Torrance,* 9 Wheat. 537, 538; *Anderson* v. *Watt,* 138 U. S. 694; *Clarke* v. *Mathewson,* 12 Pet. 164.)

All of the cases mentioned by *Amicus Curiae,* pages 15-16, save *Sutton* v. *English,* are not in point here, because courts are well aware that corporations are susceptible of manipulation for an illegal purpose. There is no suggestion that that is the case with Leo Taussig, Fannie Daus or Leontine Robitshek.

The *Sutton* case is not in point, for that merely points out that a sole beneficiary under a will would not be interested in annulling it, and that under Texas law no federal court has jurisdiction to annul a will there.

Patently the District Court was without diversity jurisdiction, the only one possibly asserted. Hence, under the "familiar doctrines" reiterated in *Indianapolis* v. *Chase, supra,* that court had authority only to realign the parties and dismiss the complaint for want of jurisdiction.

III.

The Seventh Circuit Court of Appeals Has Decided an Important Question of Federal Law Which Has Not Been, But Should Be Settled by This Court.

It must not be overlooked that *Roche* v. *Evaporated Milk Association,* 319 U. S. 21, was a criminal case. It deals with certain issues raised by a decision of the trial court upon pleas in abatement concerning the validity of certain action of the grand jury. With these matters we are not presently concerned. However, on jurisdiction, that opinion says, at page 26:

> "But the present case involves no question of the jurisdiction of the District Court. Its jurisdiction of the persons of the defendants, and of the subject matter charged by the indictment is not questioned."

And no words of Petitioner can add force to the pronouncement at page 25 that mandamus is available for the exercise of appellate jurisdiction, as Petitioner has maintained to be the law:

> "Its authority [the Circuit Court of Appeals] is not confined to the issuance of writs in aid of a jurisdiction already acquired by appeal but extends to those cases which are within its appellate jurisdiction although no appeal has been perfected. Otherwise the appellate jurisdiction could be defeated and the purpose of the statute authorizing the writ thwarted by unauthorized action of the District Court obstructing the appeal." (Citing cases.)

And, following, on page 26, is this:

> "The traditional use of the writ in aid of appellate jurisdiction both at common law and in the federal courts has been to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when its duty is to do so." (Citing cases.)

And on page 32 of that same opinion, the Court points out two functions of mandamus, one of which is commonly overlooked:

> "Thus is the two cases [*Ex parte Simons*, 247 U. S. 231; *Ex parte Skinner & Eddy*, 265 U. S. 86] in which the writ was granted, it was issued in aid of the appellate jurisdiction of this Court to compel an inferior court to relinquish a jurisdiction which it could not lawfully exercise or to exercise a jurisdiction which it had unlawfully repudiated."

It is patent that a proceeding carried forward by a District Court without jurisdiction or beyond its jurisdiction is no ordinary matter. Contrariwise, such a departure by a District Court from its statutory boundaries is an extraordinary fault, demanding and requiring and receiving, in other Circuits, the promptest of correction by mandamus. (Main Brief, points I and II.)

Ex Parte Harding, 219 U. S. 363, is not in point here: it turned on a question of citizenship being decided after hearings "which extended over a period of fifteen months" (page 369) and also that the District Court had had a full and complete hearing and proof establishing the requisite diversity ground for jurisdiction. And it was a removal case.

Mandamus is properly used to halt a court from transcending its jurisdiction despite the assertion that the court, having exercised its jurisdiction in taking the case, cannot be required to relinquish it save by appeal of error. For the law is that mandamus is proper, in this specific legal inquiry, without resorting to, or being forced to wait for other and slower means of review. *Grable* v. *Killits*, 282 Fed. 185.

Des Moines Navigation & Railroad Co. v. *Iowa Homestead Co.*, 123 U. S. 552, is of no aid here; it was decided on this point, at page 558:

> "But the record shows, with equal distinctness, that all the parties were actually before the court, and made no objection to the jurisdiction."

Which is not the situation herein, where objections to the jurisdiction of the court were made continually.

Stoll v. *Gottlieb*, 305 U. S. 165, stands for the proposition that the guarantor of bonds of a building corporation in reorganization in the bankruptcy court, which had voided the guarantee as part of the reorganization, could not be sued in the state court on that guarantee. The opinion added, in a note, page 171:

> "We express no opinion as to whether the Bankruptcy Court did or did not have jurisdiction of the subject matter."

The decision has no application at bar, for the opinion states, page 170:

> "But where the judgment or decree of the federal court determines a right under a federal statute, that decision is 'final until reversed in an appellate court, or modified or set aside in the court of its rendition'."

More important, the Stoll opinion specifically states that matters of status of persons and titles to real estate are not considered to be governed by that decision, for it states, page 76:

> "To appraise the cases dealing with status and transfer of title to real estate seems outside the scope of the present inquiry. The rule applied here may or may not be applicable in instances where the courts with jurisdiction of the later controversy are passing upon matters of status and real estate titles."

The case at bar is within the exceptions specified, since it involves the matter of removal of a trustee (R. 205) as well as transfer of title to real estate (R. 206).

IV.

The Seventh Circuit Court of Appeals Has So Far Departed From the Accepted and Usual Course of Judicial Proceedings, or So Far Sanctioned Such a Departure by a Lower Court, as to Call for an Exercise of the Court's Power of Supervision.

In precisely such a factual situation as this *Grable* v. *Killits,* 282 Fed. 185, 195, is applicable and determinative. Fundamentally the issue herein is simple. Jurisdiction of a court is a matter of proof made up of determinable facts and the application of the law to them. Jurisdiction of the subject matter cannot be conferred or waived; it does or does not exist. Equally, once the requisite diversity ground is asserted it must be determined to a "legal certainty" and cannot be a matter of conjecture. Nor can it be determined by the court's "discretion." That can be abused.

By statute, the District Court has been created and its jurisdiction specified and determined. To require that the Court act, within its defined jurisdiction, is one of the functions performed by the extraordinary writ, mandamus. The instant case is an extremely apt example of the necessity, availability and application of mandamus.

In sum, the question here is whether jurisdiction shall depend upon statutory requisites, yielding "a legal certainty," or whether *Amicus Curiae* shall succeed in making jurisdiction depend upon the "discretion" of the District Judge, whoever he chances to be. Or as has been better said:

> "The most odious and dangerous of all laws would be those depending upon the discretion of judges. Lord Camden, one of the greatest and purest of English judges, said 'that the discretion of a judge is the law

of tyrants, it is always unknown; it is different in different men; it is causal, and depends upon constitution, temper and passion. In the best it is often times caprice; in the worst, it is every vice, folly and passion to which human nature can be liable.' Courts cannot go beyond their defined powers to avoid the hardship of cases." (*State* v. *Cummings*, 36 Mo. 273, 278.)

Conclusion.

While it is true that litigation should end, it is more important that it end justly and in accordance with the applicable law.

Respectfully submitted,

STEPHEN A. MITCHELL,
DANIEL M. HEALY,
ARTHUR FRANKEL,
Attorneys for Petitioner.

August 30, 1948.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1948.

No. 78

JOSEPH M. TAUSSIG, *Petitioner,*

vs.

HONORABLE JOHN P. BARNES, UNITED STATES DISTRICT JUDGE FOR THE NORTHERN DISTRICT OF ILLINOIS, *Respondent.*

BRIEF OF AMICUS CURIAE.

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Chicago, Illinois
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Mural J. Winstin and Horace A. Young, attorneys for plaintiffs, Ruth Saxelby, J. Robert Saxelby, Jr., Lois Saxelby and Joyce Muriel Saxelby in the case of *Ruth Saxelby, et al.* v. *Joseph M. Taussig, et al.*, No. 45 C. 2271, in the District Court of the United States for the Northern District of Illinois, Eastern Division, ask leave to file a brief as *amicus curiae.* The consent of the Petitioner is filed herewith and a copy of his consent is attached hereto as Appendix A. The Respondent has stated that he does not wish to consent but that he has no objection to the filing of a brief by *amicus curiae.*

As attorneys for plaintiffs, Mural J. Winstin and Horace A. Young, consider it their professional duty to present a brief to this court and they believe that the brief presented herewith will be helpful to the court in the disposition of this matter.

BRIEF OF AMICUS CURIAE.

Foreword.

The opinion of the Circuit Court of Appeals for the Seventh Circuit (Rec. 333-337) is a well reasoned opinion. It is a full and complete answer to all contentions of the petitioner made in his petition in the Circuit Court of Appeals (Rec. 5-29), and in his memorandum brief in support thereof (Rec. 32-36).

If petitioner had submitted his petition for certiorari to this court on the basis of the legal theories contained in his memorandum brief in the Circuit Court of Appeals we would not have asked leave to file a brief as *amicus curiae*. However, petitioner has the habit of shifting theories as he passes from court to court and under these circumstances we deem it appropriate to point out some of the errors, inconsistencies and fallacies of those theories and to show this court that he is not entitled to the extraordinary writ of mandamus.

The Issues Narrowed.

In the Circuit Court of Appeals petitioner relied for relief upon the theory that the District Court lacked jurisdiction upon four grounds, namely, (1) plaintiff Saxelby, while invoking jurisdiction on the ground of diversity of citizenship at the same time appeared and actively participated in proceedings involving the same object matter in

the Probate Court of Cook County, Illinois; (2) necessary parties were omitted in the District Court proceedings; (3) a proper alignment of parties would place Minnesota and Illinois citizens on both sides of the litigation and preclude diversity jurisdiction; and (4) one of the orders sought to be vacated and expunged involved property under the sole and exclusive jurisdiction of the Cook County Probate Court (Rec. 33-35 and 333-334). The Court will note that in his petition for certiorari petitioner has not mentioned grounds (1), (2) and (4) and therefore, must be considered as having abandoned those grounds. He relies here solely upon ground (3), namely, that a proper alignment of parties would place Minnesota and Illinois citizens on both sides of the litigation and preclude diversity jurisdiction.

The Issue Here

Thus narrowed, the sole issue here may be stated as follows:

Where the District Court in the exercise of its judicial discretion has denied the motions to realign certain defendants will mandamus lie to correct the alleged errors of the District Court?

The Pertinent Facts.

We will not attempt here to restate the pertinent facts. They will be found in the opinion of the Circuit Court of Appeals (Rec. 333-337).

Certain facts omitted from the petition for certiorari will be stated herein in connection with the relevant arguments with appropriate record references.

Reasons Why the Petition for Certiorari Should Be Denied by This Court.

For sake of orderly procedure we shall follow the form of the brief contained in the petition, first answering the points and arguments made there and adding such points and arguments of our own as we deem appropriate.

I.

The decision of the Seventh Circuit Court of Appeals is not in conflict with the decisions of the other Circuit Courts of Appeals on the same matter.

Petitioner infers, but does not state, that the decree entered June 4, 1947, by Judge Barnes was a preliminary decree, and that the time for appeal has not yet arrived. We do not consider the decree entered June 4, 1947, a preliminary decree but on the contrary, consider it a final, appealable decree. If, as petitioner infers, it is only a preliminary decree then his petition in the Circuit Court of Appeals and his petition here are both premature.

Grable v. *Killits*, 282 F. 185 (cert. den. in *Bacon Bros. Co.* v. *Grable*, 260 U. S. 735) is cited for the proposition that the Sixth Circuit Court of Appeals reached a conclusion opposite to that reached by the Seventh Circuit Court of Appeals in the case at bar. We do not find any conflict. In that case the District Court never obtained jurisdiction over the persons of the defendants for the reason that all of them lived outside the territorial jurisdiction of the court and when ordered to appear they made timely objections under their special appearances. In this case all of the defendants appeared generally and Judge Barnes had jurisdiction over the person of each and every one of them.

The case of *Barber Asphalt Pav. Co.* v. *Morris* (C. C. A. 8th, 1904), 132 Fed. 945, is not contrary to the decision

of the Circuit Court of Appeals for the Seventh Circuit in the case at bar but, in fact, is entirely in harmony with it. The general rule as to mandamus is admirably stated in that case at page 956, as follows:

> "It is undoubtedly the general rule that *a court has no power by writ of mandamus to compel a subordinate judicial officer to reverse a conclusion already reached, to correct an erroneous decision, or to direct him in what particular way he shall proceed or shall decide a specified question.* But it is equally a part of this general rule that the court always has power by means of such a writ to compel such an officer to proceed to try and decide a controversy within his jurisdiction, or to perform any other plain duty imposed by law." (Emphasis added.)

In the case before him Judge Barnes has not refused to proceed. He proceeded with dispatch, disposed of the dilatory motions, determined that the real interests of the parties did not require realignment of the parties, denied the motions to dismiss, tried the case and entered a final decree.

Neither do we find any conflict in the case of *In re Dennett*, 215 Fed. 673 (C. C. A. 9, 1914). In the first place, all the Court there decided was that the order to show cause should be issued. There is no showing that the writ of mandamus was ever issued. There the alleged lack of jurisdiction of the District Court consisted of the vacating of an order after expiration of the term, a matter in which the District Court had no discretion. Here the alleged lack of jurisdiction is because Judge Barnes denied the motions to realign parties, a matter in which he had the power to decide whether the interests of those defendants were on the plaintiffs' side of the case or on the defendants' side of the case.

Petitioner has failed to show that the decision of the Seventh Circuit Court of Appeals conflicts with the decision of any other Circuit Court of Appeals.

II.

The decision of the Seventh Circuit Court of Appeals is not in conflict with the applicable decisions of this court.

A. There is no comfort for petitioner in *Marbury* v. *Madison*, 1 Cranch 137. One of the best known facts of all American history is that in that case the writ was sought to be directed, not to a court, but to James Madison, Secretary of State, a member of the executive department of the government. Furthermore, the writ of mandamus was there refused because it was not in aid of the appellate jurisdiction of the court. Likewise, here what petitioner seeks is not aid to assist him in an appeal to the Circuit Court of Appeals but rather he seeks to have the decree of the District Court expunged and the complaint dismissed. That is not in aid of an appeal. That is a substitute for an appeal.

United States v. *United States District Court*, 68 S. Ct. 1035, merely authorized mandamus to enforce a mandate.

The decision of this court in *Ex Parte Crane*, 5 Pet. 190, is not in conflict with the decision of the Circuit Court of Appeals. In that case this court held that it had power to issue mandamus to a circuit court of the United States, commanding that court to sign a bill of exceptions, in a case tried before such court. Such a writ was properly issued in aid of appellate jurisdiction because the lower court refused to act.

Petitioner also cites 3 Bl. Comm. 111, and quotes therefrom. The quotation is plucked out of the context. The preceding sentence (which gives the proper background and meaning to the quotation) is as follows:

"It issues to the judges of any inferior court, commanding them to do justice, according to the powers of their office, *whenever the same is delayed.*" (Emphasis added.)

The case of *In re Winn*, 213 U. S. 458, is distinguishable from the case at bar. There the writ was awarded because the lower court had no question upon which it could exercise judicial discretion, but this court recognized a different rule in cases where the lower court exercises judicial discretion. At page 468, this court said:

"Whenever the record, including the petition for removal, shows that these are questions of fact upon whose determination the right of removal depends and upon which it is the duty of the Circuit Court to pass judicially, then there is jurisdiction to decide those questions. Their decision is the exercise of judicial discretion and if that discretion is erroneously exercised it can be corrected only by a writ of error or appeal. *In these cases writs of mandamus must not be permitted to usurp the functions of writs of error or take their place where they offer an adequate remedy to the aggrieved party.*" (Emphasis added.)

In the case at bar, the question as to whether the interests of the defendants, Ella Robitshek, Leo Taussig and Leontine Robitshek were of such nature that they should be realigned as parties plaintiff was a question which involved the exercise of judicial discretion. Judge Barnes actually exercised that discretion and as we have heretofore shown, properly exercised it.

In spite of what petitioner says, we say that all that *McClellan* v. *Carland*, 217 U. S. 268, holds is that mandamus may be issued in aid of appellate jurisdiction.

Ex Parte United States, 287 U. S. 241, was an original petition for mandamus in this court. The grounds for the decision are stated at page 246, as follows:

> "We prefer, however, to put our determination upon the broader ground that, even if the appellate jurisdiction of this court could not in any view be immediately and directly invoked, the issue of the writ may rest upon the ultimate power which we have to review the case itself by certiorari to the circuit court of appeals in which such immediate and direct appellate jurisdiction is lodged."

The decision rests upon aid to appellate jurisdiction. It is not in conflict with the decision in the case at bar.

Petitioner cites and quotes from *In re Metropolitan Trust Co.*, 218 U. S. 312, 314. There the trial court entered an order vacating its decree after the expiration of the term. Its order was, of course, a nullity and mandamus was properly issued to enforce the mandate of the higher court.

B. The District Court was not without jurisdiction.

The first point made by petitioner under IIB of his brief is wholly misleading. *Ex Parte Crane* is discussed above. That case does not hold that where the District Court is without jurisdiction, the cause is *coram non judice* and every act done is a nullity. This phrase *coram non judice,* of which petitioner is apparently very fond, inasmuch as he uses it on every possible occasion (Rec. 29), does appear in the report of *Ex Parte Crane* but it appears on page 201, in *the dissenting opinion.*

Neither *Elliott* v. *Peirsol,* 1 Pet. 328, nor *Griffith* v. *Frazier,* 12 U. S. 1, turned on a question of lack of diversity of citizenship. In *Elliott* v. *Peirsol,* the decree of the County Court of Woodford County, Kentucky was held void because the subject matter of the decree was not within its statutory jurisdiction. In *Griffith* v. *Frazier,*

the South Carolina ordinary appointed an administrator of the personal property in an estate where there was already an executor appointed and acting. Of course, that order was void.

In *Ex Parte Bradley,* 7 Wall. 364-367, there was a complete lack of jurisdiction of the subject matter, that is, the lower court had attempted to disbar an attorney for a contempt committed not before it but before another court. In the case at bar the District Court has undisputed jurisdiction of the subject matter.

Likewise in *Virginia* v. *Rives,* 100 U. S. 313, there was complete lack of jurisdiction of subject matter.

D. L. & W. R. R. v. *Rellstab,* 276 U. S. 1, is another case where the District Court attempted to vacate a judgment after expiration of the term and a complete lack of jurisdiction. It has no application to the case at bar.

At page 11 of his petition for certiorari the petitioner says:

> "The purported waiver of the rights of appeal of petitioner and other parties to the preliminary decree should not affect in any way the questions presented to the Circuit Court of Appeals or to this Court. The parties have themselves ignored the purported waiver for the nullity that it is; * * *"

This extraordinary statement gives us opportunity to point out to the Court these pertinent and highly significant facts: The waiver and release of the rights of appeal (Rec. 294) was signed by petitioner in consideration of plaintiff agreeing to withdraw and actually withdrawing her petition to remove petitioner as Executor in the Probate Court of Cook County (Rec. 282-293). An order was entered pursuant to that agreement (Rec. 300-301).

And a few days thereafter without objection by plaintiff (Rec. 302-303) petitioner's account was approved, which included the allowance of a fee of $15,000.00 for services as Executor.

Attached hereto as Appendix B, are two letters from petitioner to Mural J. Winstin, attorney for plaintiffs, dated July 3, 1947, and July 10, 1947, respectively, which plainly show that the allowance of a fee of $15,000 to petitioner was an important part of the transaction whereby petitioner waived his rights of appeal. As a part of that same transaction plaintiffs conceded that the attorneys' fees when allowed should be allocated equally to the four trusts instead of solely against the trust of which petitioner is beneficiary (Rec. 297-298), as plaintiffs might have insisted.

An examination of Appendix B shows that the question of the amount of fees to be allowed to attorneys for plaintiffs and the question of whether or not attorneys for plaintiffs had a contract with their client did not enter into the transaction. On the contrary, it shows that all references to attorneys' fees were stricken out by delineation.

We do not believe that this Court will consider that agreement a nullity. Plaintiff gave up valuable rights and petitioner received substantial consideration.

Plaintiff has not treated the agreement as a nullity. She has carried out her end of the bargain. Petitioner is the one who has treated it as a nullity or to put it bluntly: He has reneged.

C. The District Court had judicial power and discretion to determine whether any of the defendants should be aligned as plaintiffs and exercised that discretion.

Whenever a court is confronted with the problem of aligning parties that court must decide where the real interests of the parties lie. The court has the power to make that decision and uses its discretion in making that decision. To be more analytical, what the court does is this: It considers all the facts and circumstances which indicate that the interests of the defendant are similar to that of the plaintiff and it considers all the facts and circumstances which indicate that the interests of the defendant are adverse and antagonistic to the plaintiff, then in the exercise of that mental faculty of comparison known as judgment the Court arrives at a decision to align the defendant as a plaintiff or at a decision that the defendant remains a defendant. That is what the trial court did here.

Now what facts and circumstances as to defendant, Leo Taussig, did the District Court have before it?

First, the Last Will and Testament of Maurice Taussig, Deceased (Rec. 65, 72), which showed that the trust provided for Leo was an overriding interest; second, the fact that the guardian ad litem appointed for Leo never asked to become a party plaintiff and never contended that he should be a plaintiff; third, the fact that Leo had died on February 17, 1947, prior to the trial, that his death had been suggested of record (Rec. 168) and that the first suggestion that he should have been a plaintiff was made in the motion filed on May 19, 1947 (Rec. 190-191); and fourth, the Court had before it these arguments from the brief of plaintiffs:

> "The Court will recall that under the will Leo Taussig had a preferred position and was to receive $5,000

a year before any other beneficiary received anything. The plaintiff, Ruth Saxelby, was and is a beneficiary for life and her children were and are remaindermen. The testimony shows that the Woodlawn and University Property has a net income sufficient to pay Leo Taussig $5,000 a year. His interest was limited to $5,000 a year and, therefore, had no interest in securing the return of the Drexel Property to the trust. The interest of Leo Taussig and the interest of plaintiff, Ruth Saxelby, are as different as night and day or as black and white. That fact was realized by the guardian ad litem, who in conversation with counsel for plaintiff, emphasized the preferred position of his ward. * * *.

"The Court will recall that these defendants stoutly maintained that by making the Drexel deal they saved the Woodlawn and University Property from a deficiency decree and thus saved a valuable portion of the estate for the support of Leo.

"We submit that it does not lie in the mouth of these defendants to say that Leo should have been a party plaintiff. Furthermore, he never was a party plaintiff. He died on February 19, 1947, prior to the trial and his death was suggested of record prior to the trial. He cannot now be made a party plaintiff. One fact that these defendants, in their desperation, have overlooked and that is that, first, there must be a realignment of parties and, second, the order dismissing for lack of diversity. They cite no case showing that a deceased party can be realigned. We believe there is no such case. Failing in their effort to realign the motion to dismiss must also fail.

"Even if a deceased person could be realigned this Court is not required to relinquish jurisdiction of this cause. The defendant, Leo Taussig, can be dismissed and jurisdiction is thereby established with retroactive effect. In the case of *Dollar S. S. Lines* v. *Merz,* (C. C.

A. 9th, 1934) 68 F. 2d 594, Judge Mack said at page 593:

"'Where because of the joinder of proper, though not indispensable parties as defendants, there is not merely on the record but in fact, no such diversity of citizenship as to give jurisdiction, the District Court may permit a dismissal of such parties and thereby establish jurisdiction with retroactive effect. (Citing cases.) This procedure may be followed even after a verdict against all parties has been returned; moreover judgment could then be entered against the remaining parties on the original verdict.' (Citing cases.)

"The motion to dismiss the cause should be denied. The defendant, Leo Taussig, should be dismissed as a party defendant."

What facts and circumstances did the trial court have before it as to the interests of defendant, Ella Robitshek? First, that she moved to dismiss on the sole ground that necessary and indispensable parties were not joined (Rec. 82); second, that in her answer (Rec. 147-152) she admitted that she had full knowledge of all the proceedings in the Probate Court of Cook County (Rec. 148), denied that the conveyance of the Drexel Property was without notice to them (Rec. 148), denied that there was any violation by Joseph M. Taussig of his duties as trustee (Rec. 148), denied that Joseph M. Taussig had wrongfully or improperly converted the Drexel Property to his own use and benefit (Rec. 149), denied that Joseph M. Taussig had misappropriated, misused and converted to his own use moneys belonging to the trust (Rec. 150) and prayed that the complaint be dismissed (Rec. 151); and third, the fact, that both in her pleadings and in the trial of the case she took a position adverse, hostile and antagonistic to plaintiffs. Her attorney, Vance C. Smith, Jr., Esq., sat at the

table with counsel for the principal defendants, participated with them and at the conclusion of the trial made the following statement on behalf of his client, Ella Robitshek, whose interests petitioner says are not antagonistic to plaintiffs (Transcript of Proceedings, March 15, 1947):

> "If the Court please, I should like at this time to make a very brief statement on the position of the Defendants Rose Goodman and Ella Robitshek.
>
> "Mr. Winstin has suggested here that the reason neither of those two Defendants have joined with the Plaintiff in this action is because they are subject to the control of one or the other of the trustees.
>
> "Now, with regard to that, admittedly there is a close relationship existing here, which relationship has not been sufficient to prevent the Plaintiff, Ruth Saxelby, from bringing this action.
>
> "Furthermore, I would like to point out that throughout these proceedings, not merely during the trial but during the entire action, both Ella Robitshek and Rose Goodman have been represented by independent counsel. Furthermore, Rose Goodman has been represented by a Chicago attorney, Mr. Silvertrust since 1933, which is almost the very inception of this trust. So much for the question of control.
>
> "Now, your Honor, Rose Goodman and Ella Robitshek are now and have been in the past acquainted with the matters that have been the subject of this controversy. *They believe that the actions taken by Joseph Taussig have been in the best interests of this trust estate, and they approve of those actions.*
>
> "*More specifically, they do not feel that either Irving Robitshek or Joseph Taussig should be removed as trustees of this trust. They do not feel that the Drexel property should be restored to the trust.*" (Emphasis added.)

Before the trial court and here plaintiffs point out that in

such a situation, where the defendant takes an adverse, antagonistic and hostile position, she cannot be realigned as plaintiff. There we cited and here we cite the applicable cases.

In *Hodgman* v. *Atlantic Refining Co.*, (1921) 274 F. 104, the District Court of Delaware said, at page 105:

> "The jurisdiction of this court is founded only on the fact that the suit is between citizens of different states. Judicial Code, § 24 (Comp. Stat. § 991). As both defendants are alleged to have engaged in the challenged transaction and the Delaware corporation *takes of record a position antagonistic to that of plaintiffs*, the latter company may not, for jurisdictional purposes, be realigned or regarded otherwise than as a defendant." (Emphasis supplied.)

In *Doctor* v. *Harrington*, (1904) 196 U. S. 579, 25 S. Ct. 355, 49 L. Ed. 606, Mr. Justice McKenna said, at page 587:

> "The ultimate interest of the corporation made defendant may be the same as that of the stockholder made plaintiff, but the corporation may be under a control antagonistic to him, and made to act in a way detrimental to his rights. In other words, his interests, and the interests of the corporation may be made subservient to some illegal purpose. If the controversy hence arise, and the other conditions of jurisdiction exist, it can be litigated in a Federal Court."

This ruling was followed and quoted with approval in *Howard* v. *National Telephone Co.*, (C. C. W. Va. 1910) 182 F. 215 at 220.

In the case of *Cutting* v. *Woodward*, (1918) 255 F. 633, the Circuit Court of Appeals for the Ninth Circuit said:

> "The trust company raises the question of jurisdiction, asserting that the company is not an adversary party to the plaintiffs in the suit, but is the real party in interest as plaintiff, and that consequently there

is no diversity of citizenship. But this is not a case in which the trust company, although made a defendant, should be realigned as a plaintiff, as in *Hames* v. *New York Railways,* 244 U. S. 266, 274, 37 Sup. Ct. 511, 61 L. Ed. 1125. *Here the attitude of the trust company is hostile to the plaintiffs.* It appeared in a joint answer with the appellant and by the same counsel, *and it denied the allegations of the bill and prayed for the dismissal thereof.* The cause is therefore one in which plaintiffs are citizens of California. *Doctor* v. *Harrington,* 196 U. S. 579, 25 S. Ct. 355, 49 L. Ed. 606. *Venner* v. *Great Northern Railway,* 209 U. S. 24, 28 S. Ct. 328, 52 L. Ed. 666." (Emphasis supplied.)

Moore Federal Practice under the New Federal Rules, Vol. 2, pp. 2136 and 2137:

> "If parties are not properly aligned, as where one party is made a defendant where in truth and in fact he is not adverse to the plaintiff or vice versa, the court will realign the parties according to their interests, before determining diversity.
>
> "Before making said realignment, however, the courts make certain *that the real interest* is determined *rather than some apparent interest.*"

In this connection Moore Federal Practice cites *Hirsch* v. *Stone,* C. C. A. 5th, 62 F. (2) 120 (Cert. Den.), 289 U. S. 747.

In the *Hirsch* case (*supra*) the trustee was antagonistic to noteholders under the trust; it was held that in a noteholders' action against the obligor, the trustee was properly a defendant and should not be realigned.

In *Sutton* v. *English,* 246 U. S. 199, the Supreme Court held that it was error to align one of the defendants with the plaintiff for jurisdictional purposes *where her interest was adverse to the plaintiff on one of four points.*

We, therefore, submit that Judge Barnes not only had the power to decide the motions to dismiss in the exercise of his judicial discretion but also that he properly exercised that discretion.

III.

The law of mandamus is already well settled by this Court.

Under Point III of his brief the petitioner says that the Seventh Circuit Court of Appeals has decided an important question of federal law which has not been but should be settled by this court. He cites no cases.

As a matter of fact, an examination of the decided cases shows that exactly the opposite is true and that the law of mandamus as applied to cases such as the case at bar is already well settled by this Court.

The law is well stated in the case of *Roche* v. *Evaporated Milk Assn.*, 319 U. S. 21, 26, 27, 28, as follows:

> "The traditional use of the writ in aid of appellate jurisdiction both at common law and in the federal courts has been to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so. *Ex parte Peru, supra* 584, and cases cited; *Ex parte Newman,* 14 Wall. 152, 165-6, 169; *Ex parte Sawyer,* 21 Wall. 235, 238; *Interstate Commerce Comm'n.* v. *United States ex rel. Campbell,* 289 U. S. 385, 394. Even in such cases appellate courts are reluctant to interfere with the decision of a lower court on jurisdictional questions which it was competent to decide and which are reviewable in the regular course of appeal. *Ex parte Harding,* 219 U. S. 363, 369; cf. *Stoll* v. *Gottlieb,* 305 U. S. 165; *Trienies* v. *Sunshine Mining Co.,* 308 U. S. 66."

> "Ordinarily mandamus may not be resorted to as

> a mode of review where a statutory method of appeal has been prescribed or to review an appealable decision of record."

The case of *Ex Parte Harding*, 219 U. S. 363, is exactly in point here. In that case the petitioner sought a mandamus to reverse the action of the Circuit Court of the United States for the Northern District of Illinois, Eastern Division, in taking jurisdiction over a cause as the result of a refusal to grant a request of the petitioner to remand the case to a state court. In that case, as here, it was alleged that the trial court was without jurisdiction. The petition for mandamus was denied and the Court said, at page 369:

> "The doctrine that a court which has general jurisdiction over the subject matter and the parties to a cause is competent to decide questions arising as to its jurisdiction, and therefore such decisions are not open to collateral attack, has been so often expounded (see *Dowell* v. *Applegates*, 152 U. S. 327, 337, and cases cited), and has been so recently applied (*Hine* v. *Morse*, 219 U. S. 493), that it may be taken as elementary and requiring no further reference to authority."

The filing of the petition for mandamus in the Circuit Court of Appeals and the filing of the petition for certiorari in this court constitutes a collateral attack upon the decree of the District Court. That such a decree is immune from collateral attack is one of the most firmly established doctrines of this court.

In *Des Moines Navigation & Railroad Co.* v. *Iowa Homestead Co.*, 123 U. S. 552, this Court was called upon to resolve a controversy over the effect of a judgment of the federal courts in a matter beyond their jurisdiction and based upon diversity of citizenship. This Court as-

sumed that the exercise of jurisdiction by United States Circuit Court over two Iowa corporations was improper. Nevertheless, it was held that the decree entered by the lower Court was a "prior adjudication of the matters in controversy."

The *Des Moines* case was cited and approved in *Gottlieb* v. *Stoll*, 305 U. S. 165, at 173-175. In the latter case, after an exhaustive study of the cases, Mr. Justice Reed, speaking for the Court, at page 176, said:

> "It is frequently said that there are certain strictly jurisdictional facts, the existence of which is essential to the validity of proceedings and the absence of which renders the act of the court a nullity. Examples with citations are listed in *Noble* v. *Union River Logging R. Co.*, 147 U. S. 165. For instance, service of process in a common law action within a state, publication of notice in strict form in proceedings *in rem* against absent defendants, the appointment of an administrator for a living person, a court martial of a civilian. *Upon the other hand there are quasi-jurisdictional facts, diversity of citizenship, majority of litigants, and jurisdiction of parties, a mere finding of which, regardless of actual existence, is sufficient. As to the first group it is said an adjudication may be collaterally attacked, as to the second it may not.*" (Emphasis added.)

IV.

There is no occasion for the exercise of this Court's power of supervision in this case.

An examination of the record of this case in the Circuit Court of Appeals shows that petitioner received the respectful consideration of that Court. His motion for leave to file his petition for an order to show cause why mandamus should not be allowed, was allowed (Rec. 326). The

opinion of the Court (Rec. 333-337) shows that all of the contentions made by petitioner had careful consideration. There is no need for any supervision by this Court.

Under this point petitioner persists in his fallacious statement that the District Court on the face of the record was without jurisdiction by reason of a lack of diversity of citizenship. As painstakingly pointed out in this brief the record before this Court shows no such thing. *What it does show is that Judge Barnes, in the exercise of his judicial power and discretion decided that the interests of the various defendants did not require them to be realigned as plaintiffs.* That point was preserved by the decree entered June 4, 1947, and could have been raised by appeal from that decree. No piecemeal appeal was necessary.

The record here (p. 167) further shows that Chicago Title and Trust Company was made a third-party defendant to the action before Judge Barnes. The third party complaint filed by Joseph M. Taussig, individually, was based on the owner's title guarantee policy issued pursuant to the letter of opinion which appears at pages 303-311 of the record and sought a recovery of $80,000. In a separate decree which made findings and conclusions as to jurisdiction identical with those made in the decree of June 4, 1947, here complained of, Judge Barnes denied recovery and that decree is on appeal to the Circuit Court of Appeals for the Seventh Circuit. In other words, petitioner is now in the Circuit Court of Appeals seeking to recover $80,000 relying upon the very same jurisdiction which he here assails.

This entire lack of integrity by a member of the Bar is shocking enough but it is matched by his previous performance in these related matters, his scandalous miscon-

duct in extracting the Drexel property from the family trust and concealment of the material facts from the plaintiff, his sister, the waiver of the right of appeal for a fair consideration and then reneging on that agreement and persisting in that line of misconduct by the filing here of his petition for certiorari.

CONCLUSION.

This Court has said in the case of *Stoll* v. *Gottlieb*, 305 U. S. 165, at 172:

> "It is just as important that there should be a place to end as there should be a place to begin litigation."

We respectfully and earnestly submit that this litigation ought to be ended here and now by the denial of the petition for writ of certiorari.

Respectfully submitted,

Maxwell J. Winetin

Howard A. Yo

Amicus Curiae.

Appendix A.

In the Supreme Court of the United States
October Term, 1948

No. 78

Joseph M. Taussig, Petitioner,

vs.

Honorable John P. Barnes, United States District Judge for the Northern District of Illinois.

CONSENT.

The undersigned hereby consents to the filing of a brief herein by Mural J. Winstin and Horace A. Young, as *amicus curiae*.

S/ JOSEPH M. TAUSSIG,
Petitioner.

Appendix B.

Law Offices
JOSEPH M. TAUSSIG
29 South LaSalle Street
Chicago 3

July 3, 1947.

Mr. Mural J. Winstin,
33 South LaSalle St.,
Chicago, Illinois.

Dear Mr. Winstin:

Enclosed herewith are the following papers:

1. Waivers and releases executed by Irving H. Robitshek, Ella Robitshek and Irving H. Robitshek, Jr., wherein and whereby the aforesaid Robitsheks waive and release all rights to have reviewed by bill of review, appeal, etc., the reasonableness and fairness of the amount of the fees to be allowed to plaintiffs

for services of their attorneys in the matter of Ruth Saxelby, et al., versus Joseph M. Taussig, et al., filed in the U. S. District Court for the Northern District of Illinois.

2. Waiver executed by the same parties herein whereby they waive and release all errors, etc. in connection with the decree in favor of plaintiffs entered on June 3, 1947.
3. Waiver and release similar to No. 1 aforesaid executed by Joseph M. Taussig, Rose Goodman and Leontine Robitshek.
4. Waiver and release similar to No. 1 aforesaid executed by Joseph M. Taussig, Rose Goodman and Leontine Robitshek.
5. Waivers and release similar to No. 1 aforesaid executed by Alvin Goodman and Alvin Goodman, Jr.
6. Waiver and release similar to No. 2 aforesaid executed by Alvin Goodman and Alvin Goodman, Jr.
7. Letter of direction to The Northern Trust Company in connection with any indebtedness due the Taussig Estate by Alvin W. Goodman, et al.
8. Form of agreement between Ella Taussig Robitshek, Ruth Taussig Saxelby, Rose Taussig Goodman and Joseph M. Taussig in connection with the claim for household goods.
9. ~~Form of agreement between Joseph M. Taussig and Ruth Taussig Saxelby.~~
10. Stipulation in connection with citation proceedings now pending in the Probate Court.

Numbers 1 to ~~4~~ 6 are delivered with the understanding JMT
that your client, Ruth Taussig Saxelby, or you where it is MJW
for you to do as her attorney, will execute and deliver JMT
Items ~~5~~ 7 to ~~8~~ 10 inclusive or if not the same documents others containing substantially the provisions thereof, and should it be deemed by me necessary and expedient in order to fulfil the intent and purposes contained in this letter and enclosures to have the descendants of Ruth Taussig Saxel-

by execute similar documents then in that event she will obtain the same; and with the further understanding that Items 1 to 4 inclusive will not be filed, exhibited to Chicago Title & Trust Co. used, nor considered as delivered unless an appeal be taken in said Federal Court Proceedings, it being understood that an appeal taken either by me, the American National Bank & Trust Company of Chicago, as trustee, under trust agreement dated January 14, 1940, and known as Trust Number 4954, third party plaintiffs (or the successor trustees) versus The Chicago Title and Trust Company of Chicago, third party defendant shall not be such an appeal as to justify the filing of Items 1 to 4 inclusive aforesaid.

~~These documents are delivered with the further understanding that in the event the Federal Court shall see fit to allow the plaintiffs for services of their attorneys or the attorneys themselves a sum in excess of $50,000.00 then you and your co-counsel will file a remittitur and will remit all sums in excess of $50,000.00 so allowed.~~

Will you please acknowledge receipt of the enclosures upon a copy of this letter.

Thanking you for your courtesy and cooperation, I am

Yours very truly,

JOSEPH M. TAUSSIG.

JMT:an Encs.

July 10, 1947.

Mr. Mural J. Winstin,
11 S. LaSalle St.,
Chicago, Illinois.

Dear Mr. Winstin:

Supplementing my letter with respect to paragraph "9" on page 2 and subsequently referred to in the last paragraph wherein it is said that "Ruth Taussig Saxelby or

you, as her attorney, will execute and deliver items 7 to 10 or if not the same documents others containing substantially the provisions thereof", referring particularly to the above numbered paragraph "9" and the above quotation, in lieu of said requirement in respect to said paragraph "9", it is understood that the aforesaid requirement is cancelled and in lieu thereof it is understood that Ruth Taussig Saxelby will on behalf of herself and said plaintiffs in the cause filed in the District Court of United States, for the Northern District of Illinois, 0astern Division, entitled Ruth Saxelby, et al., v. Joseph M. Taussig, et al., and by the Clerk of said Court numbered Civil Action 45 C 2271, cause to be filed a petition executed by her, in which there shall be contained in the prayer thereof:

> "Plaintiffs pray that an order may be entered herein allowing plaintiffs * * * as fees for services of their attorneys herein, and said order provide that said allowance shall become a lien, be paid and charged against Trusts "E", "F", "G" and "H" under the Last Will of Maurice Taussig, deceased."

And with the further understanding that Ruth Taussig Saxelby and her descendants will not object to but will consent to the allowance to me the sum of $15,000 as additional executor's fees in the matter of the Estate of Maurice Taussig, deceased, now pending in the Probate Court of Cook County. When said $15,000 shall be paid or credited to me I agree forthwith to pay Ruth Saxelby the sum of $3750. This $3750 shall be in full settlement of any and all claims Ruth Taussig Saxelby may have against me in connection with Larchmont and New Rochelle properties.

Yours very truly,

(Signed) J. M. Taussig.

Accepted this 10th day of July, 1947.

Mural J. Winstin.